

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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CAPITOL RECORDS, LLC, *et al.*,

Plaintiffs,

v.

MP3TUNES, LLC and MICHAEL ROBERTSON,

Defendants.
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07 Civ. 9931 (WHP)

**DEFENDANT ROBERTSON'S MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND EXHIBITS FROM ELLIS
HOROWITZ AND FOR RELATED RELIEF**

AKERMAN SENTERFITT LLP

Ira S. Sacks

Mark S. Lafayette

Vincent Y. Liu

Jamie M. Robbins

666 Fifth Avenue, 20th floor

New York, New York 10103

Telephone: (212) 880-3800

Facsimile: (212) 880-8965

Counsel for Defendant Michael Robertson

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**DEFENDANT ROBERTSON'S MEMORANDUM OF LAW IN SUPPORT OF HIS
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HOROWITZ AND FOR RELATED RELIEF**

Defendant Michael Robertson ("Robertson") submits this memorandum of law in support of his motion *in limine* precluding testimony by Plaintiffs' expert, Ellis Horowitz ("Horowitz") at trial (and all exhibits created by him) and vacating the Court's grant of summary judgment against Robertson.¹ The requested relief is required because the foundation for summary judgment was inextricably marred by pervasive errors in the exhibits submitted by Horowitz, errors which can only be explained as intentional deception by Horowitz.

In all, Plaintiffs claim infringement by 47 tracks sideloaded by Robertson. In describing those 47 tracks, Horowitz made 53 errors. Moreover, for 18 of the 47 tracks, Horowitz ignored the results of his searches in the database produced to him from MP3tunes and simply fabricated Plaintiffs' artists and songs that were allegedly infringed. To conceal that fabrication, Horowitz truncated the URL for the source of the song and omitted the file name of the song. Indeed, if Horowitz had looked at the full source URL and/or file name – both of which were available to and were used by him in other exhibits presented to this Court – he would have easily found the non-infringing actual artist and song, not the infringing ones he fabricated. In fact, the truncated URL had to be manufactured by Horowitz from the Sideload source data because the Sideload data always displays the full source URL. That willful and material deception must be subject to severe sanctions.

SUMMARY OF ARGUMENT

In its May 14, 2013 Order (Doc. No. 368), this Court found that its prior grant of summary judgment for direct infringement against Robertson was proper for the 32 of the 47

¹ If the Court vacates summary judgment against Robertson, Plaintiffs must also be precluded from referring at trial to the "fact" that the Court had once determined that Robertson to be liable for copyright infringement.

tracks listed for his two accounts, excluding two of the songs (“White Christmas” by Frank Sinatra and “Devil in Me” by 22-20s) because Plaintiffs did not provide registrations for those copyrights and 13 other songs where EMI relies on copyrights registered as compilations. As we shall show, those 15 tracks are merely the tip of the iceberg.

Summary judgment against Robertson for direct infringement was based on Exhibit X to the October 29, 2010 Horowitz Declaration (the “Horowitz Dec.”) in support of Plaintiffs’ motion for summary judgment. *See Capitol Records, Inc. v. MP3tunes, LLC*, 821 F.Supp.2d 627, 649 (S.D.N.Y. 2011) (“EMI conclusively demonstrated that EMI executives and employees downloaded its songs. (Horowitz Decl. Ex X, Z)”). Exhibit X has been designated by Plaintiffs’ as Plaintiffs’ trial exhibit (“PX”) 34 and is attached to the Declaration of Ira S. Sacks in Support of Motion *In Limine* to Preclude Testimony and Exhibits from Ellis Horowitz and for Related Relief, dated September 13, 2013 (“Sacks Dec.”) as Exhibit A; the Horowitz Dec. is attached to the Sacks Dec. as Exhibit B.

Horowitz Exhibit X lists 170 songs allegedly sideloaded by MP3tunes, LLC (“MP3tunes”) executives, including 47 in Robertson’s two MP3tunes accounts (471003 and 483009), with the date and time (down to the second) of the sideload, the source URL and the supposed artist and name of song. The source URL is truncated and the file name is omitted – that is, it does not show the full name of the internet location from which the track was downloaded. Such information (and often the name of the artist and song) was present in the MP3tunes database from which Horowitz worked and – for reasons set forth below – was intentionally truncated and omitted to hide the true name of the artist and song in numerous instances. As mentioned above, based on Horowitz Exhibit X, Robertson was accused of 47

illegal sideloads (lines 77 to 87 for account 471003 (11 tracks) and lines 133 to 168 for account 483009 (36 tracks)).

That Horowitz had both the full URLs and file names for the accused sideloads by Robertson is demonstrated by Horowitz Exhibits W1 (PX 23) and W6 (PX 28), attached to the Sacks Dec. as Exhibits C and D. Those exhibits list over 8900 sideloads by Robertson into his two lockers (107 and 8795, respectively), and includes (i) the date and time of the sideload (to the second, by clicking on the cell with the date and time), (ii) file name and sideload source (which, together, provide the full name of the source URL for the track), and (iii) the artist and song.

In some instances, there is a generic artist and track set forth in Horowitz Exhibits W1 and W6. That is because tracks sideloaded often contain embedded information – called an ID3 tag – which specifies the artist and name of the song. Occasionally tracks may only have generic ID3 information, such as “Artist” and “Track 01”.²

In situations where a generic artist and song are shown in the database, and on Exhibits W1 and W6, Horowitz inserted popular Plaintiffs’ artists and songs to create the illusion of an infringing track, despite information in the full URL and/or file name in the database indicating the true name of the actual artist and song. In a blatant attempt to mislead the Court, 17 generic “Artist” entries were assigned the names of one of Plaintiffs’ artists, and 17 generic “Track” entries were assigned the name of one of Plaintiffs’ works, all to match one of Plaintiffs’ alleged copyrights in this case. That is perjurious, nothing less. There is no legitimate explanation for those differences; the only explanation is deliberate and material deception by adding infringing

² Declaration of Michael Robertson, dated September 9, 2013 (“Robertson Dec.”), ¶ 4.

artists and songs to Horowitz Exhibit X, which did not exist on Horowitz Exhibit W1 or W6, to bolster Plaintiffs' claims against Robertson.

For example, line 146 of Horowitz Exhibit X claims that Robertson sideloaded the infringing track "Get Along With You", by Kelis from <http://www.john-ralston.com/music> at 10:06:17 on May 9, 2006. However, on Horowitz Exhibit W6, the track is described on line 2604 as John_Ralston_-_04_-_when_we_are_cats.mp3, from <http://www.john-ralston.com/music>, with the artist and track described as "Artist" and "Track 04". (See Sacks Dec., Ex. D, line 2604.) There was no basis to designate that track as an infringing track from Kelis. Indeed, if Horowitz had looked at john-ralston.com, he would have seen that John Ralston is a musician from Lake Worth, FL (<http://john-ralston.com/info>); and if Horowitz had inquired further he would have found that "When We Are Cats" is, in fact, a song by John Ralston.³ That is confirmed by listening to the track in Robertson's locker, which Robertson has done, and Horowitz or Plaintiffs did not. (Robertson Dec., ¶ 5.) That type of error appears repeatedly for alleged infringement by Robertson.

The deception by Horowitz did not stop there. Horowitz identified the **very same track** in Robertson's lockers with **different falsely fabricated Plaintiffs' artists and songs** in different of his exhibits, all with no basis. For example, on Horowitz Exhibit X, Horowitz claims (on lines 142 and 144) that Robertson downloaded the infringing track "La Bamba" by Jose Feliciano twice on March 17, 2006 from amazon.com. That alone was false, since the URL and file name on Horowitz Exhibit W6 (lines 2082 and 2109) – as opposed to the truncated URL on

³ http://www.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Daps&field-keywords=john%20ralston%20when%20we%20are%20cats. The john-ralston.com/info page and the foregoing Amazon pages are attached to the Sacks Dec. as Exhibit E.

Horowitz Exhibit X – makes clear that those two different tracks were by The O’Neill Brothers, “The Wedding Song – Kenny G” and “You Raise Me Up”.⁴

Elsewhere, Horowitz concluded that those very same tracks are not Jose Feliciano’s “La Bamba.” Instead, in both Exhibit Z to his summary judgment declaration (PX 36, attached to the Sacks Dec. as Exhibit G) and Exhibit O (PX 399, attached to Sacks Dec. as Exhibit H) to the Horowitz Supplemental Report (PX 384), dated August 8, 2013, he describes both of those two tracks as “Again”, by Lenny Kravitz. (See Sacks Dec., Ex. H at 1 (stating song is “Again” at timestamp “3/17/2006 20:22” and “3/17/2006 20:28”); Ex. G (lines 12413 and 12440 both reveals file names)).

Horowitz’ Summary Judgment Declaration was a wholesale fraud on the Court, tantamount to perjury. Horowitz swore under oath (i) that Horowitz Exhibit X “is a chart showing instances of sideloading by the MP3tunes’ executive team for works listed on the EMI Labels’ and the EMI Publishers’ lists of works at issue on this motion. The chart demonstrates that MP3tunes executive team members sideloaded at least [170] files embodying sound recordings or compositions owned by the Plaintiffs” and (ii) that Horowitz Exhibit Z is a chart showing each sideload from all of the user accounts accessing defendants’ system from IP address 198.172.200.5. This charts shows that these users were responsible for sideloading 19,068 files.” (Sacks Dec., Ex. B (Horowitz Dec.) ¶¶ 85, 87.) He also asserted that Exhibit O to his improper Supplemental Report explained “[m]y October 29, 2010 Declaration also included

⁴ See, e.g., (a) http://www.amazon.com/Prelude-The-Wedding-Song-Kenny/dp/B000QOY5WY/ref=sr_1_2?ie=UTF8&qid=1378397979&sr=8-2&keywords=the+oneill+brothers+the+wedding+song+kenny+g;

(b) http://www.amazon.com/You-Raise-Me-Up/dp/B000V97A3A/ref=sr_1_8?ie=UTF8&qid=1378398056&sr=8-8&keywords=the+oneill+brothers+you+raise+me+up, attached to the Sacks Dec. as Exhibit F.

an exhibit, ‘Exhibit Z,’ that identified the works sideloaded from accounts associated with MP3tunes’ IP address. Plaintiffs have asked me to identify the subset of the works on my Exhibit Z that are also on the Labels’ Song List and/or the Publishers’ Song List. Attached as Exhibit O is the subset of the works on my October 29, 2010 Exhibit Z that meet those criteria.” (Horowitz Supplemental Report ¶ 15.) All of those assertions were knowingly false.

Horowitz arbitrarily assigned artist and song names to match Plaintiffs’ list of works. He swore that artists were in Robertson’s lockers who were never in the lockers, the absence of whom is easily verified by examining the database from which Horowitz was working. He claimed tracks were in Robertson’s lockers which were never in the lockers – again easily ascertained via the database. As noted below, Horowitz swore under oath that one specific track was sideloaded to Robertson’s lockers five separate times, when it was never in his locker even once. In his various exhibits, Horowitz astonishingly changed the identification of a track from one of Plaintiffs’ artists and songs to an entirely different artist and song, and repeatedly fabricated artist and song names which were contradicted both by data within the database and other exhibits Horowitz provided to this Court.

These errors were not the result of sloppiness – which would, in and of itself, be sanctionable – nor were they isolated or clerical. They were intentionally deceptive as to a significant portion of the tracks at issue and material – they resulted in summary judgment against Robertson (and MP3tunes). The fraud was compounded by deception when Horowitz in the key exhibits intentionally truncated the source URL and omitted the file name, when the full source URL or the file name would reveal the true identity of the track to even the most casual reader. This intentional misconduct demands strong action from this Court.

As we shall now further demonstrate, Horowitz and his exhibits should be precluded at trial; the summary judgment against Robertson should be vacated, and the jury should not be permitted to be told of any prior findings of infringement by Robertson.

ARGUMENT

Trial preparation has revealed that *Horowitz Dec., Exhibit X, and other Horowitz exhibits are plainly and demonstrably false, and intentionally so*. The details of these errors are set forth below and in the declaration of Ken Son, dated September 9, 2013 (“Son Dec.”) and Robertson Dec. Indeed, many of them can be seen from Horowitz’ own exhibits.

I. Horowitz’ Own Exhibits Show His Fraud

A. **May 9, 2006 John Ralston**: Horowitz Exhibit X claims that Robertson illegally sideloaded three tracks from john-ralston.com (at lines 138, 146-147):

2006-May-09 10:06:17	http://www.john-ralston.com/music	Kelis	Get Along With You
2006-May-09 10:06:18	http://www.john-ralston.com/music	Fats Domino	Blueberry Hill
2006-May-09 10:06:22	http://www.john-ralston.com/music	Fats Domino	Blue Monday

Looking at the truncated URLs on Horowitz Exhibit X, one would not suspect anything was amiss. However, as noted above, looking at either the full URLs or the file names⁵, it is clear that the three downloads were of tracks cut by John Ralston, who is himself an artist (as his website makes plain). Indeed, those file names are on Exhibit W6, at lines 2604-2606, and make plain that the songs sideloaded were “When We Are Cats”, “I Believe in Ghosts”, and “Gone, Gone, Gone” by John Ralston:

5/8/2002 10:06	John_Ralston_-_04_-_when_we_are_cats.mp3	http://www.john-ralston.com/music	Track 04	Artist
5/8/2002 10:06	John_Ralston_-_05_-	http://www.john-	Track	Artist

⁵ Although Horowitz Exhibit W6 also does not have full URLs, those full URLs can be determined by combining the truncated URL with the file name. (Robertson Dec., ¶ 6.)

	_i_believe_in_ghosts.mp3	ralston.com/music	05	
5/8/2002 10:06	John_Ralston_-_07_-_gone,_gone,_gone.mp3	http://www.john-ralston.com/music	Track 07	Artist

Examination of the locker database and listening to the tracks confirms the correct names of those tracks. (Son Dec., ¶¶ 17, 18, 24; Robertson Dec., ¶ 5.)⁶

There is no innocent or negligent explanation for the false labeling of those tracks.

B. **March 17, 2006 Amazon:** Similar frauds appear with respect to supposed sideloads of tracks from Royal Philharmonic, LL Cool J, Blink 182, Janet Jackson, José Feliciano from Amazon on March 17, 2006 (Horowitz Exhibit X, lines 139-144)

2006-Mar-17 19:46:33	http://anon.amazon.speedera.net/anon.amazon/mp3	Royal Philharmonic Orchestra	A Groovy Kind of Love
2006-Mar-17 20:17:31	http://media-server.amazon.com/exec	LL Cool J	Ain't Nobody
2006-Mar-17 20:18:53	http://anon.amazon.speedera.net/anon.amazon/mp3	blink-182	I Miss You
2006-Mar-17 20:22:38	http://media-server.amazon.com/exec	José Feliciano	La Bamba
2006-Mar-17 20:23:22	http://media-server.amazon.com/exec	Janet Jackson	Every Time
2006-Mar-17 20:28:22	http://media-server.amazon.com/exec	José Feliciano	La Bamba

Again, when one examines the URLs and file names in Horowitz Exhibit W6 (lines 1909, 2052, 2059, 2082, 2085, 2109), it is clear that those tracks are not for the artists and songs fabricated by Horowitz:

3/17/2006 19:46 ⁷	Felix_Da_Housecat-Silver_Screen_Shower_Scene__Malibu_Mix.mp3	http://anon.amazon.speedera.net/anon.amazon/mp3	Track 02	Artist
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⁶ See Amazon pages attached to the Sacks Dec. as Exhibit I (http://www.amazon.com/gp/product/B00B5FCNAY/ref=dm_sp_alb?ie=UTF8&qid=1378427400&sr=8-1).

⁷ The time in seconds does not appear in Horowitz Exhibit W6, but are imbedded in the time cells and appear in the formula line when a time cell is selected.

3/17/2006 20:17	download%2Ecgi?saveas=ONeill_Brothers-What_a_Wonderful_World%2Emp3&media=B0007P6EIK001013%2Emp3&stat=dummy.download	http://media-server.amazon.com/exec	Track 13	Artist
3/17/2006 20:18	Powers,_Laura-Long_Way_Down.mp3	http://anon.amazon.speedera.net/anon.amazon/mp3	Track 06	Artist
3/17/2006 20:22	download%2Ecgi?saveas=ONeill_Brothers-The_Wedding_Song_-_Kenny_G%2Emp3&media=B0009WGIQY001001%2Emp3&stat=dummy.download	http://media-server.amazon.com/exec	Track 1	Artist
3/17/2006 20:23	download%2Ecgi?saveas=Leiahdorus-SOS%2Emp3&media=0001059351001001%2Emp3&stat=dummy.download	http://media-server.amazon.com/exec	Track 5	Artist
3/17/2006 20:28	download%2Ecgi?saveas=ONeill_Brothers-You_Raise_Me_Up%2Emp3&media=B0007P6EIK001001%2Emp3&stat=dummy.download	http://media-server.amazon.com/exec	Track 1	Artist

As the Court can see, all six tracks were unidentified in terms of artist and songs in those columns, but had a detailed file name. Felix Da Housecat, O'Neill Brothers, Laura Powers and Leiahdorus are the names of artists; and "Silver Screen Shower Scene (Malibu Mix)", "What A Wonderful World", "Long Way Down", "The Wedding Song (Kenny G)", "S.O.S." and "You Raise Me Up" are the names of songs by those artists.⁸

⁸ The following pages are attached to the Sacks Dec. as Exhibit J:

(a) <http://www.epitonic.com/artists/felix-da-housecat/>; [http://www.amazon.com/Silver-Screen-Shower-Scene-Housecat/dp/B00007LTJ4/ref=sr_1_3?s=music&ie=UTF8&qid=1378409867&sr=1-3&keywords=felix+da+housecat+silver+screen+shower+scene](http://www.amazon.com/Silver-Screen-Shower-Scene-Housecat/dp/B00007LTJ4/ref=sr_1_3?s=music&ie=UTF8&qid=1378409867&sr=1-3&keywords=felix+da+housecat+silver+screen+shower+scene;);

(b) http://www.amazon.com/What-a-Wonderful-World/dp/B000V95Q22/ref=sr_1_34?ie=UTF8&qid=1378406897&s=dmusic&sr=1-34;

(c) <http://www.amazon.com/dp/B005XLYNHM>;

(d) http://www.amazon.com/Prelude-The-Wedding-Song-Kenny/dp/B000QOY5WY/ref=sr_1_cc_1?s=aps&ie=UTF8&qid=1378166734&sr=1-1-catcorr&keywords=oneill+brothers+the+wedding+song+Kenny+G;

Not only that, the Horowitz fraud regarding the six March 17, 2006 tracks from Amazon, is compounded in Exhibit O (Sacks Dec., Ex. H) from the Supplemental Horowitz Report, dated August 8, 2013, which claims to list all songs sideloaded from the MP3tunes IP address that are on Plaintiffs' list of works. José Feliciano's "La Bamba" – supposedly sideloaded twice on March 17, 2006, at 8:22:38 PM and 8:28:22 PM, according to Horowitz Exhibit X (lines 142, 144) – nowhere appears in Horowitz Exhibit O; and the tracks previously wrongly attributed to that song at those precise times in the same locker from the same source URL are now supposedly – and wrongly – "Again" by Lenny Kravitz. (Sacks Dec., Ex. H at 1.) To the same effect, Royal Philharmonic's "Groovy Kind of Love" (Horowitz Exhibit X, line 139) does not appear in Horowitz Exhibit O, nor does the track attributed to it; Janet Jackson's "Every Time" does not appear in Horowitz Exhibit O, and the track attributed to that song is now fraudulently claimed to be "Digital Love" by Daft Punk (*compare id.*, line 143 (time stamp "2006-Mar-17 20:23:22") with Horowitz Exhibit O at 1 (time stamp "3/17/2006 20:23")); and LL Cool J's "Ain't Nobody" does not appear in Horowitz Exhibit O, and the track attributed to that song is now perjurally attributed to Janet Jackson's "Got 'Til Its Gone". (*Compare* Horowitz Exhibit X, line 140 ("2006-Mar-17 20:17:31") with Horowitz Exhibit. O at 1 ("3/17/2006 20:17")).

Again, that was willful fraud; there is no innocent or negligent explanation for the false labeling of those tracks.

C. **"Again" by Lenny Kravitz:** The one reference to a supposed sideload of "Again" by Lenny Kravitz in Horowitz Exhibit X was not that song at all. The truncated URL at line 165 of

(e) http://www.amazon.com/S-O-S/dp/B0013PH1GM/ref=sr_1_1?ie=UTF8&qid=1378166561&sr=8-1&keywords=Leiahdorus+S.O.S; and

(f) http://www.amazon.com/gp/product/B000V97A3A/ref=dm_dp_trk1?ie=UTF8&qid=1378167002&sr=1-57

Horowitz Exhibit X is www.memphis-industries.com, and the time of the sideload was September 12, 2007 at 4:21:29 PM. But the source URL and file name make clear – as is confirmed by the locker database – that the track was for a totally different artist and song: that track appears at line 7847 of Horowitz Exhibit W6, is “giveitloseittakeitbyfieldmusic.mp3” from www.memphis-industries.com, and is attributed to “Track 1” by “Artist”. There is no innocent or negligent explanation for the false labeling of that track as “Again” by Lenny Kravitz. Indeed, looking at the URL and file name discloses that that song is the track on the album “Tones of Town” by the artist Field Music.⁹

There are other oddities about the song “Again” by Lenny Kravitz. Although that song appears five times on Horowitz Supplemental Report Exhibit O, supposedly downloaded by Robertson three times into one account and two times into another account, it only appears once in Horowitz Exhibit X, and (as noted above) is in fact a song by Field Music, not Lenny Kravitz. It is peculiar enough for Horowitz to suggest that Robertson would sideload the identical song multiple times, but Horowitz Exhibit O absurdly asserts that Robertson sideloaded that song twice, six minutes apart, on March 17, 2006 and twice, two minutes apart, on July 19, 2006! Furthermore, Horowitz Exhibit O also asserts, contrary to logic and common sense, that Amazon mislabeled multiple tracks as the same Lenny Kravitz song.

⁹ See Son Dec., ¶ 25; Robertson Dec., ¶¶ 6, 9; http://www.amazon.com/gp/product/B0092MJ25G/ref=sr_1_album_1_rd?ie=UTF8&child=B0092MJ2GK&qid=1378168160&sr=1-1, attached to the Sacks Dec. as Exhibit K.

The file names on Horowitz Exhibit O for the supposed Lenny Kravitz song “Again” also makes plain that the tracks were not Lenny Kravitz, and were not all the same song or by the same artist (file names highlighted¹⁰):

1. http://media-server.amazon.com/exec/download%2Ecgi?saveas=O'Neill%20Brothers-The%20Wedding%20Song%20-%20Kenny%20G%2Emp3&media=B0009WGIQY001001%2Emp3&stat=dummy.download (3/17/2006 20:22)
2. http://media-server.amazon.com/exec/download%2Ecgi?saveas=O'Neill%20Brothers-You%20Raise%20Me%20Up%2Emp3&media=B0007P6EIK001001%2Emp3&stat=dummy.download (3/17/2006 20:28)
3. http://media-server.amazon.com/exec/download%2Ecgi?saveas=O'Neill%20Brothers-You%20Raise%20Me%20Up%2Emp3&media=B0007P6EIK001001%2Emp3&stat=dummy.download (7/19/2006 1:12)
4. http://media-server.amazon.com/exec/download%2Ecgi?saveas=O'Neill%20Brothers-The%20Wedding%20Song%20-%20Kenny%20G%2Emp3&media=B0009WGIQY001001%2Emp3&stat=dummy.download (7/19/2006 1:14)
5. http://www.memphis-industries.com/giveitloseittakeitbyfieldmusic.mp3 (9/12/2007 16:21)

D. www.thecasualties.net/mp3s: Basement Jaxx is listed as the artist for the song “Red Alert” and Daft Punk is listed as the artist for the song “Around the World” on lines 158 and 159 of Horowitz Exhibit X, from the truncated URL <http://www.thecasualties.net/mp3s>. However, the information in Horowitz Exhibit W6 discloses, on lines 5291 and 5294, that the source URL and file name for those sideloads are http://www.thecasualties.net/mp3s/cas_made_in_nyc.mp3 and http://www.thecasualties.net/mp3s/cas_intro_otfl.mp3, and attributed to “Artist”, “Track 03” and “Track 02”, respectively. If Horowitz had visited the website, or inquired, instead of

¹⁰ Certain special characters, such as a space or a period, can sometime cause problems in URLs. An encoding system was developed to replace these special characters. A space is replaced with “%20” and a period with “%2E.” “O'Neill%20Brothers-You%20Raise%20Me%20Up%2Emp3” in URL thus translates to “O'Neill Brothers-You Raise Me Up.mp3” in plain text.

fabricating infringing tracks, he would have seen that The Casualties are a music group that released the songs “On The Front Line” and “Made in NYC”.¹¹ Again, there was no basis for Horowitz to blindly assign infringing songs to those tracks.

E. www.ldsmusicworld.net/audio: Line 136 of Horowitz Exhibit X asserts that “Shut Up” by Black Eyed Peas was sideloaded from <http://www.ldsmusicworld.net/audio> on April 14, 2006. That is a particularly astonishing assertion since that site was (and is) affiliated with the Church of Latter Day Saints. Not surprisingly, the URL and file name in Horowitz Exhibit W6 discloses the following: lyndsi_aheroiknow.mp3 from <http://www.ldsmusicworld.net/audio>, attributed to “Track 07” by “Artist”. (Sacks Dec., Ex. D (Horowitz Exhibit W6), line 2433.) A search for that song reveals that is it “A Hero I Know” by Lyndsi Housekeeper. (<http://lyndsihmusic.blogspot.com/search?q=a+hero+I+know>, attached to the Sacks Dec. as Exhibit M). Again, blatant fabrication by Horowitz.

F. [Dirtnap Records](#): The tracks “Digital Love” by Daft Punk and Frank Sinatra’s “White Christmas” are claimed by Horowitz Exhibit X (lines 156, 160) to have been sideloaded on July 30, 2006 from the truncated URL www.dirtnaprecs.com. A simple review of that site reveals that it is the website for Dirtnap Records. Horowitz Exhibit W6 (at lines 5045 and 5360) reveals that the URL and file names include blacksunday.mp3 and cinch.mp3, respectively, and attributed to “Artist” and “Track 05” and “Track 03”. Black Sunday and The Cinch are artists,

¹¹ See Son Dec., ¶¶ 29, 31; see, e.g., http://www.amazon.com/On-The-Front-Line/dp/B001122QHG/ref=sr_1_8?ie=UTF8&qid=1378949306&s=dmusic&sr=1-8; http://www.amazon.com/Made-NYC-The-Casualties/dp/tracks/B000UGG364/ref=dp_tracks_all_1?ie=UTF8&qid=1378403676&sr=1-1#disc_1, attached to the Sacks Dec. as Exhibit L.

with albums released by Dirtnap Records.¹² Indeed, those MP3s remain listed on the Dirtnap Records' site. (*See* Son Dec., Ex. 3.) Despite that, Horowitz selected two alleged infringing works from Plaintiffs' works list for Horowitz Exhibit X for those tracks.

G. **July 30, 2006**: Horowitz Exhibit X (lines 134, 154, 157) claims the following illegal sideloads on July 30, 2006:

23:14:45	http://www.labrador.se/mp3	Duran Duran	Ordinary World
21:25:33	http://www.acefu.com/MP3s	Daft Punk	One More Time
22:11:39	http://www.thebloodbrothers.com/the_blood_brothers	Janet Jackson	All for You

Horowitz Exhibit W6 (lines 4825, 5065, 5363) discloses the following details, however:

cinnamon-maybe.mp3	http://www.labrador.se/mp3	Track 01	Artist
Aqui-AsTheBladeDipsDown.mp3	http://www.acefu.com/MP3s	Track 10	Artist
The_Blood_Brothers_-_Cecilia_And_The_Silhouette_Saloon.mp3	http://www.thebloodbrothers.com/the_blood_brothers	Track 7	Artist

Again, instead of looking at the file name or full source URL, Horowitz assigned alleged infringing artists and songs with no basis for doing so. And even a rudimentary review would have disclosed that Cinnamon, Aqui (on the Label Acefu) and The Blood Brothers are artists, with songs including "Maybe In The Next Life", "As The Blade Dips Down", and "Cecelia and the Silhouette Saloon."¹³ Indeed, the Cinnamon track is still available from

¹²<http://www.amazon.com/Tronic-Blanc-Black-Sunday/dp/B0009K8L0W>; http://www.amazon.com/Shake-If-You-Got-It/dp/B008IPCXT0/ref=sr_shvl_album_1?ie=UTF8&qid=1378949634&sr=301-1, attached to the Sacks Dec. as Exhibit N.

¹³ See the following pages attached to the Sacks Dec. as Exhibit O:

(a) <http://www.amazon.com/Maybe-In-The-Next-Life/dp/B000QN3LZW>;

<http://www.labrador.se/mp3/cinnamon-maybe.mp3> and The Blood Brothers track is still available at <http://thebloodbrothers.com/The%20Blood%20Brothers%20-%20Cecilia%20And%20The%20Silhouette%20Saloon.mp3>. (Robertson Dec., ¶ 7.)

The foregoing errors were intentional and material, designed to deceive this Court. Plainly someone changed the artists and song names to Plaintiffs' artists and songs and hid the change by truncating the URLs on Horowitz Exhibit X in connection with the Summary Judgment Motion. That misconduct and perjury must be the subject of severe sanctions.

II. The Son and Robertson Declarations Confirm The Fraudulent Entries

As shown by a basic review of the MP3tunes database, the Horowitz entries on PX 61 and PX 62 (attached as Exhibits P and Q to the Sacks Dec.) – supposedly showing sideloads by Robertson of Works owned by Plaintiffs and Initial Sideloads by Robertson – are littered with intentional errors. We will not repeat all of those here. They may be summarized as follows:

In **PX 61, Sideloads by Robertson of Works owned by Plaintiffs**, there are 47 sideloads with are 53 errors (*see* Son Dec., ¶¶ 5-27):

- 13 errors specifying an artist that did not exist in the specified locker.
- 19 errors specifying a song name that did not exist in the specified locker.
- 18 errors specifying an incorrect artist name for a track contradictory to the database.
- 18 errors specifying an incorrect title for a song contradictory to the database.
- 1 error specifying a song as having been sideloaded when it was not.

In **PX 62, Initial Sideloads by Robertson of Works owned by Plaintiffs**, totaling 24 works, there are 65 errors (*see* Son Dec., ¶¶ 28-41):

(b) <http://acefu.net/artist.php?bid=264>; and

(c) http://www.amazon.com/Cecilia-And-The-Silhouette-Saloon/dp/B002VHH5XA/ref=sr_1_cc_3?s=aps&ie=UTF8&qid=1378411861&sr=1-3-catcorr&keywords=cecilia+blood+brothers

9 errors specifying an artist that did not exist in the specified locker.

14 errors specifying a song name that did not exist in the specified locker.

14 errors specifying an incorrect artist name for a track contradictory to the database.

14 errors specifying an incorrect title for a song contradictory to the database.

14 errors specifying an initial sideload that is not possible in light of other data.

There is one entry that is particularly deceptive and worth highlighting. PX 62, as well as Horowitz Exhibit X, assert that Robertson sideloaded “Put Your Records On” by Corinne Bailey Rae, from kylia.hautefort.com/files on May 30, 2007 at 10:29:12, and that it was the initial sideload of that song. That is false. Robertson sideloaded that song into his locker 483009 on March 10, 2006 from <http://audio.sxsw.com/2006/mp3> (*see* Horowitz Exhibit W6, line 113), a site Plaintiffs admit was authorized. (*See* Sacks Dec., Ex. R (Request for Admission No. 251) and Ex. S (Appendix A #251)).

* * * * *

All of those intentional deceptions are in addition to the 2 songs that were not copyrighted and the 13 tracks that were part of compilations. In addition, a document produced by Hopeless Records, Inc. pursuant the subpoenas authorized by this Court on July 3, 2013 (Doc. No. 375), makes plain that Hopeless Records – the label for Avenged Sevenfold – had authority to offer the free download of “Eternal Rest” by Avenged Sevenfold that Robertson sideloaded on July 30, 2006 from the Hopeless Records website (Horowitz Exhibit X, line 155). (*See* Sacks Dec., Exs. T, U and V.)

III. Under Controlling Law, Horowitz’ Testimony And Exhibits Should Be Precluded, As Should Reference to Prior Findings of Liability

It goes without saying that that a material fraudulent statement under oath should be the subject of severe sanctions. The fraud by Horowitz here misled this Court into granting

summary judgment against Robertson on 18 tracks that he never sideloaded. Horowitz and all his exhibits should be precluded from testifying at trial, as should all reference to prior findings of liability against Robertson.¹⁴

This Court plainly has the power to do so. Inherent power sanctions available to courts include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence. *See* Gregory P. Joseph, **Sanctions: The Federal Law of Litigation Abuse** § 28(A) (2d ed. 1994); *accord S.E.C. v. Smith*, 710 F.3d 87, 97 (2d Cir. 2013) (under inherent power of the court, sanctions are appropriate for willful false statement to the court and court has broad discretion in tailoring appropriate sanction); *Radecki v. GlaxoSmithKline*, 375 F. App'x 46, 47-48 (2d Cir. 2010) (district court did not abuse its discretion in imposing sanction of dismissal where plaintiff gave willfully false testimony concerning a material matter); *Koch v. Pechota*, 2013 WL 3892827, at *10 (S.D.N.Y. July 25, 2013) ("While preclusion is indeed a harsh remedy, district courts have wide discretion in determining whether to impose sanctions"); *Banco de Ponce v. Buxbaum*, 1991 WL 258768, at *6 (S.D.N.Y. Nov. 27, 1991) (holding that preclusive sanctions were warranted upon finding of bad faith on defendant's part).

¹⁴ Robertson also believes that a monetary sanction is appropriate but is reserving his rights on that at this time.

CONCLUSION

For all the foregoing reasons, Plaintiffs’ motion *in limine* precluding testimony by Plaintiffs’ expert, Horowitz at trial (and all exhibits created by him) and precluding references at trial to the “fact” that Robertson has been determined to be liable for copyright infringement should be granted. At minimum, because it was premised on Horowitz’s fraud, the summary judgment against Robertson for “songs he personally sideloaded from unauthorized sites” should be vacated. *See Capitol Records, Inc.*, 821 F.Supp.2d at 649.

Dated: New York, New York
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Respectfully Submitted,

AKERMAN SENTERFITT LLP

By: /s/ Ira S. Sacks

Ira S. Sacks
Mark S. Lafayette
Vincent Y. Liu
Jamie M. Robbins
666 Fifth Avenue, 20th floor
New York, New York 10103
Telephone: (212) 880-3800
Facsimile: (212) 880-8965

Counsel for Defendant Michael Robertson